The retired pay of any officer of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, or Public Health Service who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

This provision is not a retirement statute (26 Comp. Gen. 417, 419), but relates solely to the method of computing the retired pay of any officer of the Army, etc., thereafter retired under any provision of law and who has served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918. By its express terms the provision applies only in the case of an officer thereafter retired and hence can have no application in connection with computing the retired pay of any member of the uniformed services who is not an officer at the time of his retirement. Compare 26 Comp. Gen. 5, 9. The question presented is answered in the negative.

[B–127919]

Transportation of Dependents—Overseas Employees—Dependents Return Prior to Return of Employee

The dependents of an overseas Federal employee who were returned to the United States at Government expense, pursuant to the authority in section 7 of the Administrative Expenses Act of 1946 which authorizes return transportation for compelling personal reasons, and then return at personal expense to the overseas station are not eligible for return transportation to the United States at Government expense incident to the employee's separation from service upon completion of the same tour of duty.

Although an overseas employee who is eligible for home leave travel may not be allowed round-trip transportation for his dependents who were returned at Government expense to the United States for personal reasons during the same tour of duty, he may be allowed one-way transportation for his dependents at Government expense back to the overseas station.

Under the act of August 31, 1954, the return of an overseas employee's dependents and household effects is not dependent upon the employee performing such travel and, therefore, at the time of an employee's separation from the service overseas his dependents and household effects may be returned at Government expense even though he remains overseas.

To the Secretary of Defense, July 5, 1956:

Reference is made to the letter of May 8, 1956, from the Assistant Secretary of Defense (Comptroller) requesting our decision on several questions which have arisen in connection with the implementation of the act of August 31, 1954, 68 Stat. 1008, Public Law 737, 5 U. S. C. 73b–3, amending section 7 of the Administrative Expenses Act of 1946, 60 Stat. 808, 5 U. S. C. 73b–3, concerning transportation for dependents of civilian employees. The questions will be answered in the order presented.

Example 1: An employee recruited for overseas duty assignment signs a transportation agreement for a specific period of overseas service. He is joined

at his overseas permanent duty station by his dependents for whom transportation at Government expense was authorized. Before completion of the agreed period of service advance transportation is officially authorized and performed by the employee's dependents under the "compelling personal reasons of a humanitarian or compassionate nature" provisions of Public Law 737, 83rd Congress. Subsequently, the dependents return to the employee's overseas duty station at no expense to the Government and remain until the agreed tour of duty is completed.

(1) Are they eligible for transportation at Government expense to accompany the employee after completion of his agreed period of service when he is returned to his place of actual residence for separation?

Section 7 of the Administrative Expenses Act of 1946, 60 Stat. 808, as amended by the act of September 23, 1950, 64 Stat. 985, 5 U. S. C. 73b-3, provides that the expenses of return travel and transportation upon separation shall be allowed whether such separation is for the purposes of the Government or for personal convenience; but that such expenses shall not be allowed unless the employee has served outside the United States for a minimum period of not less than one nor more than three years prescribed in advance, or unless the separation is for reasons beyond the control of the individual and acceptable to the department or agency concerned. The first proviso of the act of August 31, 1954, 68 Stat. 1008, further amending section 7, provides that the expenses of round trip travel of employees and transportation of immediate family from posts of duty outside the continental United States to the places of actual residence at time of appointment or transfer to such overseas posts of duty shall be allowed in the case of persons who have satisfactorily completed an agreed period of service overseas and are returning to their actual places of residence for the purpose of taking leave prior to serving another tour of overseas duty under a new written agreement entered into before departing from the overseas post. The second proviso of such act provides that the expenses of transportation of the immediate family and shipment of household effects from the post of duty of such employee outside the United States to place of actual residence shall be allowed, "not in excess of one time," prior to the return of such employee to the United States when the employee has acquired eligibility for such transportation or when the public interest requires the return of the immediate family for compelling personal reasons of a humanitarian or compassionate nature, such as may involve physical or the mental health, death of any member of the immediate family, or obligation imposed by authority or circumstances over which the individual has no control.

Prior to the act of August 31, 1954, and on the basis of the provisions of the act of September 23, 1950, we held that where compelling personal circumstances required that dependents be returned before the employee became entitled to transportation at Government expense, the employee could be reimbursed for expenses incurred therein from

personal funds upon the completion of his agreed period of service, provided certain specified conditions were satisfied. 32 Comp. Gen. 143. The employee could be reimbursed for only one return of dependents incident to a particular tour of duty. If under those circumstances the dependents returned to the employee's overseas post prior to the completion of the employee's tour of duty, the employee upon separation at the completion thereof would not have been entitled to an additional return of dependents from the overseas post at Government expense. The legislative history of the act of August 31, 1954, does not disclose any intent to increase the employee's entitlement in this respect. The only difference between the prior and present law lies in the fact that under prior law such transportation was required to be made at personal expense, subject to later reimbursement when eligibility therefor was acquired; whereas under the present provisions of law, the transportation may be initially authorized at Government expense with no requirement for expenditure of personal funds. See Senate Report No. 1944, 83rd Congress, 2d Session, page 3.

A further indication that Congress did not intend to permit more than one return of dependents incident to each tour of duty is found in House Report No. 2096, 83rd Congress, 2d Session, page 3, stating as follows:

> The second proviso permits the Government to pay the expenses of transportation of the employee's immediate family and shipment of household effects from the post of duty to the employee's place of residence, *not in excess of once for each tour of duty*, when the employee has acquired eligibility for such transportation or when the public interest so requires, for compelling reasons of a humanitarian or compassionate nature, or because of obligation imposed by authority or circumstances over which the individual has no control. [Italics supplied.]

Also, see Title VII, section 28, Executive Order No. 9805, as added by Bureau of the Budget's Circular A–4, May 2, 1955.

Accordingly, the question is answered in the negative.

> (2) Are they eligible for round trip transportation at Government expense to accompany the employee, who has complied with the prescribed requirements, and is authorized round trip reemployment travel under the provisions of Public Law 737, 83rd Congress?

The legislative history of the first proviso of the act of August 31, 1954, shows that it was intended to supply the statutory authority which we had held was necessary for employees, who were entitled to return transportation on separation, to be allowed return transportation at Government expense for travel performed for the purpose of taking leave. Senate Report No. 1944, *supra*, pages 1 and 2. Since the employee's dependents, in this case, may not be returned from overseas at Government expense incident to the employee's separation, it follows that they may not be returned at Government expense incident to the employee's leave travel. The question is answered in the negative.

(3) If the answer to (2) above is negative and dependents are required to travel at no expense to the Government in accompanying the employee from his overseas duty station, are the dependents eligible for transportation at Government expense one way from the employee's place of actual residence returning to the overseas duty station with the employee under reemployment?

While the employee may not be allowed round trip transportation of dependents by reason of their having already performed return travel from overseas at Government expense incident to the same tour of duty, he may be allowed under the first proviso of the act their one-way transportation at Government expense back to his overseas duty station. See 35 Comp. Gen. 101.

Example 2: An employee has completed an agreed period of overseas service thereby earning entitlement for transportation at Government expense from his overseas official duty station to his place of actual residence upon separation. Transportation for his dependents and household goods is included in his earned transportation entitlement.

(1) Transportation for the employee, his dependents and household goods is authorized at the time of separation. However, the employee uses the transportation authorization only for his dependents and household goods and does not perform travel himself. The employee elects to be separated overseas and remains in the overseas area for an indefinite period. Is partial use of the earned entitlement for transportation proper if the full authority is not used?

(2) May a travel order be issued only for transportation of dependents and household goods at the time of the employee's separation if the employee does not actually perform travel himself?

Prior to the act of August 31, 1954, we held that under the general language of section 7 of the Administrative Expenses Act of 1946, as amended by the act of September 23, 1950, an employee's dependents and household goods could be returned at Government expense from overseas when he had acquired eligibility for such transportation, even though the employee did not return, provided the employee elected to serve at the overseas station for an additional period. 31 Comp. Gen. 683. The second proviso of the act of August 31, 1954, provides a specific statutory basis for payment of the prior return of the dependents and household goods "when the employee has acquired eligibility" for his return transportation. Under the statute, entitlement to return transportation of dependents and household goods at Government expense is not dependent upon the employee, himself, performing such travel. Accordingly, questions (1) and (2) of Example 2 are answered in the affirmative.

[B-127382]

Regulations—Administrative—Necessity for Conformance to Law—Withholding of Pay on Account of Indebtedness to United States

A Navy regulation which was issued in 1948 to implement section 1766, Revised Statutes, prohibiting payment of compensation to persons who are in arrears to the United States, may not be regarded as a valid regulation subsequent

member belongs has been alerted for movement to a restricted station outside the United States contemplated to commence within 90 days. The member is not required to move from his permanent station until he or his unit receives permanent change-of-station orders, and his dependents may remain at that station indefinitely. If the member relocates his dependents upon receipt of the "alert" notice he does so of his own choice. Hence, there is no enforced separation prior to the effective date of the permanent change-of-station orders.

As indicated above, in answer to question 18 in 43 Comp. Gen. 332, we held that if dependents are returned from overseas under paragraph M7105 of the regulations for reasons of national interest prior to return of the sponsor, family separation allowance would be authorized. While the decision did not specifically so state, the answer was predicated on a determination by the Secretary of the service concerned, or by higher authority, under which the dependents are required to leave the overseas area for reasons of national interest rather than on their own volition. That the movement of dependents from the station concerned under paragraph M7105 is required, rather than elective, is clearly indicated by subparagraph 2 thereof which provides that when the authority which made the original determination subsequently determines that the "national interest no longer requires the absence" of the dependents from the overseas area, transportation of the dependents from the designated place to the member's current unrestricted duty station is authorized as there provided. Thus, that decision does not afford a basis for the proposed action.

Since the "alert" notice is not a permanent change-of-station order and as the dependents are free to reside with the member until he is required to move, there is not an enforced separation of the member from his family by reason of such notice. Therefore, family separation allowance, type II, is not authorized under section 427(b)(1) prior to the effective date of the permanent change of station when dependents are moved from the member's station under paragraph M7108 of the Joint Travel Regulations incident to an "alert" notice.

Accordingly, the question is answered in the negative.

[B-158880]

Transportation—Dependents—Overseas Employees—Home Leave—Return Prior to Employee

When the renewal agreement travel of an overseas employee is deferred because of the exigencies of the service, he may not waive his right to the travel in exchange for the unauthorized monetary benefit of the round-trip transportation of his dependents for the purpose of vacationing in the United States, and 5 U.S.C. 73b-3 prescribing the periodic return of overseas employees, adherence to the rule in 35 Comp. Gen. 101 is required. However, although paragraph C7004-2

of the Joint Travel Regulations may not be amended to authorize the round-trip home leave travel at Government expense of dependents traveling to the United States unaccompanied by the employee, at a later date when the employee signs a new employment agreement and performs the round-trip home leave, he may be reimbursed for the expense of returning his family to the overseas station.

To the Secretary of the Air Force, August 22, 1966:

This is in reply to your Under Secretary's letter of July 27, 1966, requesting an advance decision concerning round-trip transportation of the immediate families of overseas employees when the employees defer or purport to waive their home leave travel due to the exigencies of the service.

In the letter it was pointed out that due to the currently imposed workload stemming from the necessary movement of many Department of Defense activities from France to other countries in Europe, it has been necessary to defer granting renewal agreement travel to the United States to many otherwise eligible employees. It appears that many employees do not object to waiving renewal agreement travel but desire that their dependents now be authorized round-trip home leave travel at Government expense for the purpose of a vacation in the United States.

The letter suggests that the situation here is distinguishable from that considered in 35 Comp. Gen. 101 where the employee's home leave travel was delayed 1 year after return of his family.

Therefore, our decision is requested on the following questions.

a. Is it permissible to change JTR, par. C7004–2, to provide that where it is necessary because of the exigencies of the service to deny an eligible employee round-trip renewal agreement travel for a period in excess of 90 days, members of his immediate family may be authorized such travel with the employee to perform the renewal agreement travel as soon as his services can be spared?

b. Is it permissible to change JTR, par. C7004–2, to provide that where it is necessary because of the exigencies of the service to deny an eligible employee round-trip renewal agreement travel for a period in excess of 90 days, members of his immediate family may be authorized such travel provided the employee waives his right to renewal travel and prior to his immediate family's departure signs a new transportation agreement to be effective upon the date of the immediate family's return to the employee's overseas post of duty?

The questions raised require consideration of two provisos contained in section 7 of the Administrative Expenses Act of 1946, as amended, 5 U.S.C. 73b–3 (5 U.S.C. 5728, 5729). Those provisos read in part as follows:

* * * *Provided further*, That expenses of round trip travel of employee and transportation of immediate family but excluding household effects, from their posts of duty outside the continental United States to the places of actual residence at time of appointment or transfer to such overseas posts of duty, shall be allowed in the case of persons who have satisfactorily completed an agreed period of service overseas and are returning to their actual place of residence for the purpose of taking leave prior to serving another tour of duty at the same or some other overseas post, under a new written agreement entered into before departing from the overseas post: * * * *Provided further*, That expenses of transportation of the immediate family and shipment of household effects of any

employee from the post of duty of such employee outside continental United States to place of actual residence shall be allowed, *not in excess of one time,* prior to the return of such employee to the United States, including its Territories and possessions, when the employee has acquired eligibility for such transportation * * * [Italic supplied.]

The first proviso in the above statute does not authorize payment of the transportation expenses of the immediate family of an employee from the overseas post of duty to the actual place of residence in the continental United States and return unless the employee himself returns to the continental United States for the purpose of taking leave. 36 Comp. Gen. 10; B–137605, March 17, 1961. However, an employee's dependents may travel to the continental United States under the second proviso, above, at Government expense at the time he has attained eligibility for return transportation by reason of his completion of an agreed period of service. 35 Comp. Gen. 101; see also JTR C7003–3b(1)(2). The second proviso, however, is limited solely to return transportation for the immediate family and household effects from the overseas post in advance of the employee's return.

We believe, however, that the situation is covered by the rule stated in 35 Comp. Gen. 101 which, quoting from the syllabus, reads in part as follows:

An employee who has completed an agreed period of service at an overseas post is entitled, under the home leave act of August 31, 1954, to one-way transportation for members of his immediate family who travel to his residence in United States unaccompanied by him, and where the employee performs round-trip home leave travel at a later date expenses of returning family to his overseas post at an earlier date would then be reimbursable, provided that prior to his departure from overseas he signs a new agreement for service to begin on return.

Also, see B–158513, March 1, 1966.

Furthermore, since a primary purpose of the governing statute, as evidenced by its legislative history, is to bring the employees to the United States periodically for what has been termed re-Americanization leave it is doubtful whether an employee lawfully might permanently waive such a right as it accrues solely in exchange for an unauthorized monetary benefit such as round-trip travel at Government expense of his immediate family.

In the light of what has been said our opinion is that affirmative answers to the questions presented would require not only a reinterpretation of the statute but a substantive change in its language.

Therefore, while we are aware that adherence to the rule stated in 35 Comp. Gen. 101 might place upon an employee the temporary financial burden of returning his family to Europe, we are unable to find in the law a basis for answering the questions in the affirmative.

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In accordance with this administrative determination, notice of cancellation of your contract effective September 1, 1955, was sent to you on March 1, 1955. On March 8, 1955, you were sent a copy of a bulletin outlining the proposed terms of a new contract to be awarded effective September 1, 1955. One of the conditions of the new proposal was that the insurer be licensed to do business in all 48 States, in Hawaii, Alaska, Puerto Rico, and the Virgin Islands. After some correspondence with FHA, you submitted a proposal by letter dated May 20, 1955. However, you were not then licensed to do business in all States, and in your proposal you stated that you would require a "reasonable extension of time" to secure such licenses. You were advised that your proposal could not be considered. Thereafter, on June 14, 1955, you executed the formal agreement prescribed by FHA, but you deleted the requirement of section 2 (d) thereof that every policy be written by an agent licensed to do business in the particular State or territory involved. In lieu of this provision you inserted one under which the FHA would agree to permit you a reasonable time to become licensed in all States and territories. Proposals received from two other companies made no exceptions to the terms of the agreement proposed by FHA.

We see no valid objection to the administrative determination to require the desired insurance to be written by a company licensed to do business in the State or territory where the insured property is located. Indeed, it seems likely that the discontinuance of services heretofore performed by FHA in processing claims for losses would require the insurer to be so licensed. You were given nearly six months' notice of this requirement. Continuity of insurance after September 1, 1955, is, of course, necessary to FHA. Under these circumstances, your failure to become licensed to do business in all States and territories by September 1, 1955, is in our opinion a sufficient basis to consider your proposal non-responsive to the FHA solicitation, particularly in view of the fact that other companies are able to meet this requirement.

[B-124663]

Transportation—Dependents—Employees Electing to Remain Overseas for Additional Period

An employee who has completed an agreed period of service at an overseas post is entitled, under the home leave act of August 31, 1954, to one-way transportation for members of his immediate family who travel to his residence in United States unaccompanied by him, and where the employee performs round-trip home leave travel at a later date expenses of returning family to his overseas post at an earlier date would then be reimbursable, provided that prior to his departure from overseas he signs a new agreement for service to begin on return.

Since the phrase "places of actual residence at time of appointment or transfer" is not defined in the home leave act of August 31, 1954, and the act does not restrict payment to the place from which transferred, an employee who was stationed in Kansas City, Missouri, at the time of transfer to an overseas station in the Pacific, but whose actual residence was in Rhode Island, may be paid for home leave travel to his residence in Rhode Island on completion of his required tour of duty and agreement to serve an additional period overseas.

To the Secretary of Commerce, August 24, 1955:

Reference is made to letter of July 12, 1955, from the Assistant Secretary of Commerce for Administration, requesting a decision in two cases involving the application of the home leave travel provisions of the act of August 31, 1954, 68 Stat. 1008, Public Law 737, 5 U. S. Code 73b-3.

The first case involves an employee presently serving at the Weather Bureau Airport Station at Honolulu, T. H., who has completed a tour of duty at that point. He has indicated a willingness to sign an employment agreement to serve another tour of duty in the Pacific. However, he has asked, in requesting authority to travel, that his wife be authorized to travel to the States and return this year and that he be permitted to perform travel next year.

Public Law 737 is in part as follows:

* * * *Provided further*, That expenses of round trip travel of employee and transportation of immediate family but excluding household effects, from their posts of duty outside the continental United States to the places of actual residence at time of appointment or transfer to such overseas posts of duty, shall be allowed in the case of persons who have satisfactorily completed an agreed period of service overseas and are returning to their actual place of residence for the purpose of taking leave prior ot serving another tour of duty at the same or some other overseas post, under a new written agreement entered into before departing from the overseas post: *Provided further*, That expenses of transportation of the immediate family and shipment of household effects of any employee from the post of duty of such employee outside continental United States to places of actual residence shall be allowed, not in excess of one time, prior to the return of such employee to the United States, including its Territories and possessions, when the employee has acquired eligibility for such transportation * * *.

Under the first proviso of the quoted statute the Government's obligation to pay the round-trip transportation of the immediate family is contingent upon its obligation to pay the home leave travel expenses of the employee himself. An employee is entitled to expenses of home leave travel only when performed between the date of completion of one agreement and "prior to serving another tour of duty * * * under a new written agreement." The round-trip transportation expenses of members of his immediate family must be incurred incident to home leave travel performed by an employee himself to be reimbursable.

On the other hand, where an employee has acquired eligibility for return transportation to the United States by reason of having completed an agreed period of service at an overseas post, he is entitled under the second proviso of the quoted section to one-way transporta-

tion to his actual place of residence in the United States for those members of his immediate family who actually travel to that point unaccompanied by him. The return transportation of such members of the employee's immediate family to the employee's overseas post, however, is not allowable under that proviso. In the event the employee himself actually performs round-trip home leave travel at a later date, the expenses of returning his immediate family to his overseas post would be reimbursable by the Government under the leave proviso. Should such separate travel occur, it would be necessary that prior to his departure from his overseas station the employee sign a new agreement specifying a period of service to begin on the date of his return from leave.

The second case involves an employee who also has completed a tour of duty in the Pacific, has indicated a willingness to sign an agreement to serve an additional tour of duty, and has requested travel from Honolulu to his residence in Rumford, Rhode Island, and return. This employee was originally appointed for duty at Boston, Massachusetts, on January 27, 1948, and, before being transferred to Honolulu, served at a number of stations in the United States for short periods. He last served in the States at Kansas City, Missouri. It stated that your Department is in doubt as to whether expenses should be restricted to those involving round-trip travel to Kansas City, Missouri. It is stated further that the employee's actual residence is Rumford, Rhode Island, and he has no interest in the station from which transferred.

The term "places of actual residence at time of appointment or transfer" is not defined in Public Law 737 and neither is it defined in the regulations of the Bureau of the Budget implementing that law. While in many—perhaps the majority—cases the place of actual residence at time of the transfer overseas factually would be the place from which transferred, the law does not restrict the payment of home leave travel expenses to that place. The place constituting the "actual residence" must be determined upon the facts and circumstances in each individual case. The responsibility for that determination is primarily an administrative one. In doubtful cases we would, of course, make such a determination upon request, provided the complete facts be submitted. In the instant case, we are unable to make an independent determination as to the location of the employee's actual residence from the meager facts presented. Assuming, however, the correctness of the conclusions stated in the Assistant Secretary's letter concerning the actual place of residence of the employee being Rumford, Rhode Island, at time of transfer, we believe that payment of otherwise proper home leave travel expense to that point would be authorized by law.